LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 17 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962.

No. 556.

BRIDGEPORT FEDERAL SAVINGS AND LOAN ASSOCIATION, *Petitioner,*

v.

FEDERAL HOME LOAN BANK BOARD

and

QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, *Respondents.*

BRIEF FOR RESPONDENT QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HENRY W. SAWYER, III,
PATRICK T. RYAN,
Attorneys for Respondent, Quaker City Federal Savings and Loan Association.

Of Counsel:
RAYMOND K. DENWORTH,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania.

International, 711 So. 10th St., Phila. 47, Pa.

INDEX.

	Page
Opinions Below	1
Questions Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Denying the Writ	3
A. The Petition Violates Rule 23(4) of the Supreme Court of the United States	3
B. There Is No Conflict Between Decisions	3
C. The Decision Below Is Not Erroneous	4
1. An Administrative Procedure Act Hearing Was Not Required	4
2. The Hearing Satisfied the Procedural Due Process to Which Petitioner Was Entitled	6
3. The Determination of the Board Is Not Reviewable	7
Conclusion	9
Appendix A:	
Resolution Decision of the Federal Home Loan Bank Board	11
Appendix B:	
Relevant Portion of Home Owners' Loan Act of 1933, 48 Stat. 128	13
Relevant Portion of Code of Federal Regulations, 12 C. F. R., §§ 505.10 to 505.12, 542.2, 545.6-6, 545.14	14

TABLE OF CITATIONS

Cases:

	Page
Cafeteria Workers v. McElroy, 367 U. S. 886 (1961)	6, 7
Federal Home Loan Bank Board v. Rowe, 284 F. 2d 274 (D. C. Cir. 1960)	3, 4, 8
First National Bank of McKeesport v. First Federal Savings and Loan Association, 225 F. 2d 33 (D. C. Cir. 1955)	3, 5, 6, 7, 8
Kansas City Power & Light Company v. McKay, 225 F. 2d 924 (D. C. Cir. 1955)	5
North Arlington Nat. Bank v. Kearny Federal Savings and Loan Association, 187 F. 2d 564 (3 Cir.), cert. denied 342 U. S. 816 (1951)	6
Springfield Institution for Savings v. Worcester Federal Savings and Loan Association, 329 Mass. 184, 107 N. E. 2d 315, cert. denied 344 U. S. 884 (1952)	6
Tennessee Power Co. v. T. V. A., 306 U. S. 118 (1939)	5

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. A. Sec. 1001 et seq. (1946)	2, 8
Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. A. Sec. 1461 et seq.	2, 4, 6, 7, 13

Other Authorities:

12 C. F. R.:	
Sec. 505.10-505.12	2, 7, 14, 15
Sec. 542.2	2, 6, 16
Sec. 545.6-6	2, 5, 16
Sec. 545.14	2, 17

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 556.

BRIDGEPORT FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD

AND

QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

BRIEF FOR RESPONDENT QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 199 F. Supp. 410 (1961). The Opinion of the United States Court of Appeals for the Third Circuit is reported at 307 F. 2d 580 (1962).

QUESTIONS PRESENTED.

1. Whether either (a) the Home Owners' Loan Act of 1933 or (b) due process requires that an application for permission to establish a branch office of a Federal savings and loan association be determined by the Federal Home Loan Bank Board pursuant to the Administrative Procedure Act.

2. Whether the hearing held on the application in question satisfied the procedural due process to which Petitioner was entitled.

3. Whether the Federal Home Loan Bank Board's decision approving an application for permission to establish a branch office is reviewable.

STATUTES AND REGULATIONS INVOLVED.

Administrative Procedure Act, 60 Stat. 237, U. S. C. 1001 et seq. (1946); Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1461, et seq., and regulations found in 12 C. F. R., §§ 505.10-505.12, 542.2, 545.6-6, 545.14 (See Appendix B attached).

STATEMENT OF THE CASE.

The Petitioner's Statement of the Case in order to convey a full understanding should be supplemented with the following facts:

Quaker City Federal Savings and Loan Association (hereinafter sometimes referred to as "Respondent" or "Quaker City Federal") is a Federal corporation chartered by the Federal Home Loan Bank Board on April 17, 1935.

Bridgeport Federal Savings and Loan Association (hereinafter sometimes referred to as "Petitioner" or "Bridgeport Federal") is a Federal corporation chartered by the Federal Home Loan Bank Board in 1952.

REASONS FOR DENYING THE WRIT.

A. The Petition Violates Rule 23(4) of the Supreme Court of the United States.

The Petition consists of extensive excerpts from the brief which the Petitioner filed as Appellant in the United States Court of Appeals for the Third Circuit. The "Reasons for Granting the Writ" section of the Petition contains only six (6) * new paragraphs, the balance consisting of somewhat rearranged but lengthy *verbatim* excerpts from the brief. Under the circumstances the Petitioner's reasons why the writ should be granted are not valid ones and are in violation of Rule 23(4) of the Supreme Court of the United States.

B. There Is No Conflict Between Decisions.

The decision of the Third Circuit Court of Appeals, as to which review is sought, is in harmony with the decision of the United States Court of Appeals for the District of Columbia in *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33 (1955). The uniform decisions of the two courts of appeals are not in conflict with the decision of any other court for the questions presented have never been raised anywhere else. The only other case relating to the questions presented by the Petition is the decision of the United States Court of Appeals for the District of Columbia in *Federal Home Loan Bank Board v. Rowe*, 284 F. 2d 274 (1960). The *Rowe* case involved an application for a charter, as opposed to an application for a branch office,

* The last two paragraphs on page 9 and the first full paragraph on page 10; the paragraph commencing on the bottom of page 11 and ending on page 12; the introductory paragraph on page 15; and the paragraph commencing on the bottom of page 22 and ending on page 23.

but it is directly in point as to the reviewability of a decision of the Federal Home Loan Bank Board (hereinafter sometimes referred to as the "Board"). The *Rowe* case, therefore, also supports the Respondent's position that the Petition should be denied.

C. The Decision Below Is Not Erroneous.

The arguments in the Petition are based solely upon the premise that the decision of the court below is erroneous. The Petitioner argues that it possesses a property right to be free from the competition of Quaker City Federal's branch office. That claimed property right Petitioner infers from Section 5(e) of the Home Owners' Loan Act of 1933 (hereinafter sometimes referred to as "HOLA"), 48 Stat. 128, 12 U. S. C. A. § 1464(e), which specifies the criteria or standards to guide the Board in its decisions on an *application for a charter.* Based upon that inferred statutory right Petitioner then argues that it is entitled to the procedures prescribed by the Administrative Procedure Act and to judicial review of the determination of the Board. Petitioner's arguments are without merit because its claimed property right does not exist.

1. *An Administrative Procedure Act Hearing Was Not Required.*

Section 5(e) of HOLA, 12 U. S. C. A. § 1464(e) does not confer on Petitioner a property right to be free from the competition of Quaker City Federal's branch office. That section relates to the granting of charters and not to the establishment of branch offices. The granting of a charter and the establishment of a branch office are entirely different matters. A chartered association has the right to obtain savings capital from an unlimited area; and it has the right to lend within its regular lending area, described by a radius of fifty miles. 12 U. S. C. A. § 1464(c);

12 C. F. R. § 545.6-6. Since Quaker City Federal was chartered seventeen years before Bridgeport Federal, Bridgeport Federal received its charter subject to Quaker City Federal's operating rights which included operation through a branch office if the Board so permitted. The Court in *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33 (D. C. Cir. 1955), recognized the obvious distinction between an application for a charter and an application for a branch office. In discussing the regulatory requirements of a branch office application the Court stated:

> "Nothing is said about protection from 'undue injury to . . . local thrift and home-financing institutions', as is the case in an original grant. It seems reasonable, once a federal association is established under the grant of an original charter and able to make loans within a fifty-mile radius of the home office, that the question of the establishment of branches should be committed to *agency discretion* . . . (Emphasis added.)
>
> • • •
>
> ". . . [T]he same formalities are not required in the consideration of an application for a branch. Section 5(e) quoted above refers simply to 'charters,' and governs the Board's consideration of an application for the grant of a charter to establish an 'institution.' A branch, however, is not an 'institution' and does not require a charter, its establishment being of an entirely different character." *Id.* pp. 35, 36.

The Board's decision in this case included a specific finding that the establishment of the branch office will not cause undue injury to Bridgeport Federal (See Appendix A attached). Bridgeport Federal has no common law right to be free of competition. *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118 (1939); *Kansas City Power & Light Company v. McKay*, 225 F. 2d 924 (D. C. Cir. 1955).

The Home Owners' Loan Act of 1933, 12 U. S. C. A. §§ 1461-1468, contains no provision with respect to applications for branch offices of Federal savings and loan associations or the determination thereof by the Board. The courts have determined that the Act implicitly authorizes the establishment of branch offices. *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33, 35 (D. C. Cir. 1955); *North Arlington Nat. Bank v. Kearney Federal Savings and Loan Association*, 187 F. 2d 564 (3 Cir.), *cert. denied*, 342 U. S. 816 (1951); *Springfield Institution for Savings v. Worcester Federal Savings and Loan Association*, 329 Mass. 184, 107 N. E. 2d 315, *cert. denied*, 344 U. S. 884 (1952).

The Board's regulation contained in 12 C. F. R. § 545.14 specifies what an application should contain but it does not set forth any procedure, subsequent to the filing of the application, relating to the Board's determination on the application. The only reference in the Board's regulations to a hearing on a branch office application is found in 12 C. F. R. § 545.2, which provides that the Board in its judgment may dispense with a hearing. That power in the Board indicates the wide scope of its discretion with respect to branch office applications.

The Court in *First National Bank of McKeesport v. First Federal Savings and Loan Assn.*, 225 F. 2d 33 (D. C. Cir. 1955), rejected the contentions of the plaintiff that the Administrative Procedure Act applies to the establishment of a branch office because of Section 5(e) of the Home Owners' Loan Act of 1933 or because of the requirements of constitutional due process. The decision of the court below is in accord.

2. *The Hearing Satisfied the Procedural Due Process to Which Petitioner Was Entitled.*

Procedural due process is a flexible concept based on the circumstances of the governmental function involved and the private interest affected. *Cafeteria Workers v.*

McElroy, 367 U. S. 886 (1961). The governmental function here involved is regulation of financial institutions. The private interest affected is Bridgeport Federal's alleged right to be free from the competition of Quaker City Federal's branch office. The governmental function is a delicate one involving expertise. The private interest claimed to be affected is unsupportable in the law. The decision of the court below dealt fully with the procedural due process issue and held contrary to Petitioner's position. The court in *First National Bank of McKeesport* is in accord.

The hearing conducted by the Board did not violate any provision of the Home Owners' Loan Act of 1933, and, in fact, was in full conformity with the Board's regulations governing hearings on branch office applications. Petitioner makes no attempt to refute that contention. The hearing was designedly limited in scope; and inquiry was precluded into Quaker City Federal's financial ability to operate a branch office. That limitation was in conformity with the Board's regulations relating to the confidential nature of its records. 12 C. F. R. §§ 505.10 to 505.12. The Board's regulation in 12 C. F. R. § 505.12 states that matters relating to the condition and affairs of financial institutions are confidential because they involve delicate and sensitive matters.

As the hearing held did not violate any provision of HOLA, and was in conformity with the regulations promulgated by the Board, the Petitioner received the procedural due process to which it was entitled.

3. *The Determination of the Board Is Not Reviewable.*

The determination by the Federal Home Loan Bank Board approving Quaker City Federal's application for permission to establish a branch office is not subject to judicial review. There is no provision in the Home Owners' Loan Act of 1933, or in the rules and regulations

promulgated thereunder, for judicial review of the Board's action in connection with a branch office application. The Court in *Federal Home Loan Bank Board v. Rowe*, 284 F. 2d 274 (D. C. Cir. 1960), held that the Board's determination of an initial charter application was not subject to judicial review. That being the law with respect to charter applications, *a fortiori*, the Board's determination on a branch office application is not subject to judicial review. The issue of judicial review of the Board's determination of a *branch* office application was considered in *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33 (D. C. Cir. 1955), and that Court correctly held that the Board's determination was not reviewable.

The provisions of the Administrative Procedure Act show that a claim to judicial review cannot be based on that Act. Section 10 of the Act, 5 U. S. C. A. § 1009, provides in pertinent part:

> "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) *agency action is by law committed to agency discretion.*
>
> "(a) Right of Review.—Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (Emphasis added.)

The approval or denial of a branch office application is committed to the discretion of the Federal Home Loan Bank Board. *Federal Home Loan Bank Board v. Rowe*, 284 F. 2d 274, 278 (D. C. Cir. 1960); *First National Bank of McKeesport v. First Federal Savings and Loan Association*, 225 F. 2d 33, 35, 36 (D. C. Cir. 1955). The decision of the court below is in accord.

CONCLUSION.

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY W. SAWYER, III,
PATRICK T. RYAN,
Attorneys for Respondent, Quaker City Federal Savings and Loan Association.

Of Counsel:

RAYMOND K. DENWORTH,
DRINKER BIDDLE & REATH.

APPENDIX A.

Resolution Decision of the Federal Home Loan Bank Board.

No. 14,375

DATE: March 7, 1961

WHEREAS, Federal Home Loan Bank Board Resolution No. 13,399 dated April 26, 1960, provided for a hearing upon the application of the Quaker City Federal Savings and Loan Association, Philadelphia, Pennsylvania, for permission to establish a branch office at, or in the immediate vicinity of, 149 South Gulph Road, King of Prussia, Upper Merion Township, Montgomery County, Pennsylvania, at which hearing any interested person could appear in person or by attorney and submit any evidence pertinent to the questions at issue, and notice of such hearing was duly given; and

WHEREAS, the said matter came on for hearing before a Hearing Officer for the Federal Home Loan Bank Board in Room 827, Federal Home Loan Bank Board Building, Washington, D. C., on Monday, the twentieth day of June 1960, at ten o'clock in the forenoon; and

WHEREAS, certain motions were made by Protestants; and

WHEREAS, the complete record of the cause and the merits of the application, together with the motions by Protestants have been duly considered; and

WHEREAS, it is determined that a necessity exists for a branch office at, or in the immediate vicinity of 149 South

Gulph Road, King of Prussia, Upper Merion Township, Montgomery County, Pennsylvania, there is a reasonable probability of its usefulness and success, and said branch office can be established at such locality without undue injury to properly conducted existing local thrift and home-financing institutions;

NOW, THEREFORE, IT IS RESOLVED That the motions by Protestants are denied; and

IT IS FURTHER RESOLVED That the application of the Quaker City Federal Savings and Loan Association, Philadelphia, Pennsylvania, for permission to establish a branch office at, or in the immediate vicinity of, 149 South Gulph Road, King of Prussia, Upper Merion Township, Montgomery County, Pennsylvania, is hereby approved subject to the association's complying with such conditions as shall be established by further action of this Board.

By the Federal Home Loan Bank Board.

(*s*) GRENVILLE L. MILLARD, JR.,
Assistant Secretary.

APPENDIX B.

Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1464 et seq.

5(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided*, That not more than $35,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 20 per centum of the assets of such association may be loaned on other improved real estate without regard to said $35,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further*, That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank or in the obligations of the Federal National Mortgage Association: *And provided further*, That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter. In addition to the loans and investments otherwise authorized, such associations may purchase, subject to all the provisions of this paragraph except the area restriction, loans secured by first liens on improved real estate which are insured under the provisions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended.

Without regard to any other provision of this subsection except the area requirement such associations are authorized to invest a sum not in excess of 15 per centum of the assets of such association in loans insured under subchapter I of chapter 13 of this title, in unsecured loans insured or guaranteed under the provisions of the Service-

men's Readjustment Act of 1944, as amended, and in other loans for property alteration, repair, or improvement: *Provided,* That no such loan, unless so insured or guaranteed, shall be made in excess of $3,500.

12 C. F. R. §§ 505.10 to 505.12.

§ 505.10. *Records in control of the Federal Home Loan Bank Board.* All requests to inspect official records shall be in writing and delivered to the Office of the Secretary, Federal Home Loan Bank Board, Federal Home Loan Bank Board Building, 101 Indiana Avenue NW., Washington 25, D. C., with a statement of the name or names of the party or parties making such request and the concern of said party or parties in the matter. All records of the Board are in its custody and control for purposes relating to the powers, duties and authorities of the Board, under the provisions of the Federal Home Loan Bank Act, as amended, the Home Owners' Loan Act of 1933, as amended, and Reorganization Plan No. 3 of 1947, 3 CFR, 1947 Supp., Chapter IV. No officer or employee has any control over such records and no discretion with regard to permitting the use of them for any other purpose. All such officers and employees are hereby prohibited from giving out any official information obtained by any one of them on behalf of the Board, or any of such records, to any private person or to any local officer or to any court, including the production of such records or copies thereof made pursuant to their official duties, whether in answer to a subpoena duces tecum or otherwise. Whenever any such subpoena shall have been served upon any of them, they will appear in court in answer thereto, and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the rules and regulations in this part.

§ 505.11. *Records in control of agents, etc.* All records in the control of any person, including any of the Federal

Home Loan Banks or the Federal Savings and Loan Insurance Corporation, in the capacity as agents of the Board, or in the hands of any officer or employee of the Board, must be considered deemed to be privileged and confidential, and such records are in their custody and control for purposes relating to the powers, duties and authorities of the Board under the provisions of the Federal Home Loan Bank Act, as amended, the Home Owners' Loan Act of 1933, as amended, and Reorganization Plan No. 3 of 1947. They have no control over them and no discretion with regard to permitting the use of them for any purpose. All such agents are hereby prohibited from giving out any official information obtained by any one of them on behalf of the Board, or any of such records, to any private person or to any local officer or to any court, including the production of such records or copies thereof made pursuant to their official duties, whether in answer to a subpoena duces tecum or otherwise. Whenever any such subpoena shall have been served upon any of them, they will appear in court in answer thereto, and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the rules and regulations in this part.

§ 505.12. *Confidential character.* The giving out of any such records or information, or documents relative thereto, by any of the persons referred to in §§ 505.10 and 505.11 is held to be contrary to public policy by reason of its privileged and confidential character involving delicate and sensitive matters relating to the condition and affairs of financial institutions and not to be permitted. In all cases where any such documents or records, or copies thereof, are desired by, or on behalf of, any private party, or parties to a suit, whether in a court of the United States or any other, such information or copies shall be furnished only upon the written authorization or approval of the Board, or such person or persons as may be authorized by it to grant such authorization or approval.

12 C. F. R. § 542.2.

Hearings. Any person who has made an application or petition to the Board pursuant to any provision of Parts 542, 544, 545, or 546 of this subchapter may request a hearing thereon, provided such application or petition has been denied or disapproved by the Board. At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person. The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists.

12 C. F. R. § 545.6-6.

§ 545.6-6. *Lending area.* The regular lending area of a Federal association consists of the area within a radius of fifty miles from such association's home office and, in the case of a Federal association which is converted from a State-chartered institution, that territory beyond fifty miles from its home office in which such association made loans while operating under State charter. Any Federal association may make loans in its regular lending area and, within the 20-percent-of-assets limitation as defined in § 545.6-7, in other territory: *Provided,* That such association shall comply with the provisions of the rules and regulations for insurance of accounts with respect to loans on the security of real estate located more than fifty miles from the association's home office. Each converted association that desires to continue to make loans beyond fifty miles from its home office in territory in which it made loans while operating under State charter shall file with the Board a map showing the territory

within which such association made loans while operating under State charter. For the purpose of this section a county is the unit of "territory" in which a converted association made loans beyond a radius of 50 miles from its home office while operating under State charter.

12 C. F. R. § 545.14.

Branch Office. No Federal association may establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for permission to establish or maintain a branch office shall state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; the estimated annual volume of business, income, and expenses of such branch office; and shall be accompanied by a proposed annual budget of such association. Any business of a Federal association, except the approval of loans, may be transacted at a branch office, as authorized by its board of directors. A detailed record of all transactions of any branch office of a Federal association shall be maintained at such office and such control records as may be necessary for the proper conduct of such association's business shall be furnished by such branch office to its home office.